IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT

JODHPUR.

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JUDGMENT

1. S.B. Civil First Appeal No.44/1982

RoopShanker (died)& ors. vs. Smt.Shashi Bala & ors.

2. S.B.Civil Second Appeal No.136/2001

Premvati (died) vs. Kanchan Devi and others.

DATE OF JUDGMENT ::: 15.2.2007

REPORTABLE

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

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| Mr. Ranjeet Joshi | for Smt. Premvati | Parties in Second Appeal no.136/2001 |
| Mr. RR Nagori, Mr. Ranjeet Joshi | for Rajesh Kumar Pandey | |
| Mr. SG Ojha, Mr. SN Trivedi | for Smt. Shashibala | |
| Mr. Vinay Jain | for Anand Sharma | |
| Mr. JK Bhaiya, Mr. Pradeep Shah | for Smt. Kanchan Devi | |
| Mr. OP Sawhney | for Smt. Kanchan Devi | Parties in First Appeal no.44/1982 |
| Mr. OP Sawhney | for Smt Sajjan Devi | |
| Mr. OP Sawhney | for Smt Kanchan Sharma, Ajay, Rajendra, Vijay, Ashok, Namita & Vinay. | |
| Mr. Ranjeet Joshi | for Rajesh Kumar Pandey | |
| Mr. Ranjeet Joshi | for Smt. Premvati | |

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BY THE COURT:

Heard learned counsel for the parties.

A suit for partition was filed by one Smt. Shashibala widow of Pramod Shanker in the year 1973 in the Court of District Judge, Bikaner being civil original suit no.37/1973 (17/1977). According to the plaintiff Smt. Shashibala, defendant no.1 Roop Shanker – father-in-law of plaintiff Shashibala, inherited certain properties which were never partitioned. The husband of plaintiff died on 2.9.1967. According to the plaintiff, since she got share in the property, which is in possession of her father-in-law Roop Shanker, therefore, she is entitled to claim share in the property and according to the plaintiff, since her husband had half share in the entire properties, therefore, she is entitled to half share in the properties which are in the hands of defendant no.1. Defendant no.2 – Smt. Premvati was impleaded as party as she was second wife of defendant no.1 Roop Shanker thereby step mother-in-law of plaintiff.

Both the defendants submitted common written statement before the trial court and admitted that except properties mentioned in sub-paras (क) and (ग) of para no.6 of the plaint, all properties were ancestral properties. According to defendants, the

plaintiff's husband took his share in his life time and separated from undivided Hindu family of the defendant no.1. It is said that the agricultural land was given in the share of husband of the plaintiff and, therefore, deceased Pramod Shanker, husband of the plaintiff, at the time of death had no share in the joint Hindu family property. Therefore, no property devolved upon the plaintiff.

On the basis of above pleas, the issues were framed.

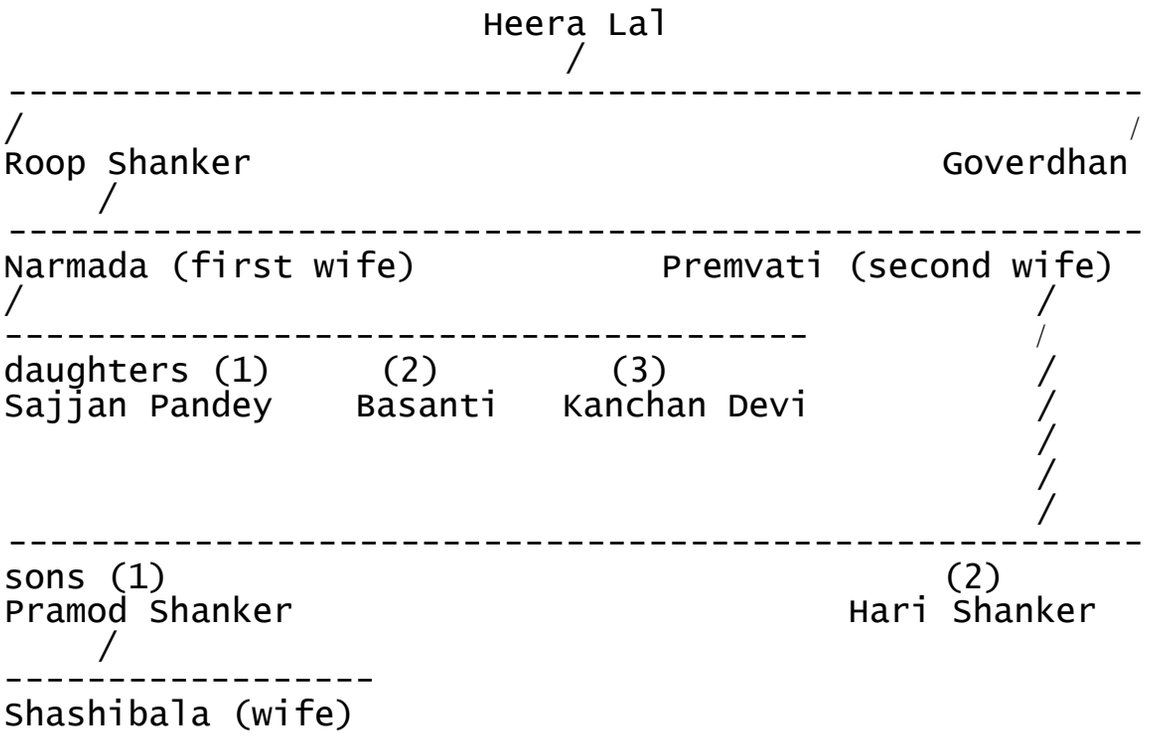
After trial, the trial court vide judgment and decree (preliminary decree) dated 10.2.1982 declared that the properties mentioned in sub-paras (क), (ख), (ग), (घ) and (ज) of para no.5 are ancestral properties and the plaintiff has 1/8$^{th}$ share and, therefore, she is entitled to take this 1/8$^{th}$ share in the properties mentioned above by partition.

This judgment and preliminary decree dated 10.2.1982 has been challenged by defendants Roop Shanker and Premvati by filing S.B. Civil First Appeal No.44/1982.

It will be worthwhile to notice that Hari Shanker, son of Roop Shanker and Premvati, has not been shown as party in the judgment and decree of the trial court dated 10.2.1982 but he has been impleaded as party in S.B. Civil First Appeal No.44/1982.

During the pendency of the suit, appellant no.1 Roop Shanker died on 26.9.1986, appellant no.3 Hari Shanker died on 14.4.1993 and appellant no.2 Premvati died on 13.12.2002.

At this juncture, it would be appropriate to give pedegree of deceased Roop Shanker :-




As is clear from the pedegree given above, Roop Shanker had two wives namely, Narmada Pandey and Premvati. Narmada Pandey gave birth to three daughters namely, Sajjan Pandey, Kanchan Devi and Basanti Devi. Roop Shanker contracted second marriage with Premvati.

One of the daughters of Roop Shanker and Narmada Pandey – Kanchan Devi filed another suit for partition

of the properties of Roop Shanker on 10.4.1994 in the Court of Civil Judge, Bikaner. In this suit no.138/1994, Smt. Kanchan Devi also impleaded her sons and daughters as plaintiffs no.2 to 7. Suit was filed against Smt. Premvati. Since Roop Shanker died in the year 1986, as mentioned above, therefore, he was not party in this subsequently filed suit no.138/1994. Kanchan Devi in her suit also impleaded Shashi Bala [plaintiff in earlier filed suit no.37/1973 (17/1977)]. She also impleaded her real sister Sajjan Pandey as defendant. Kanchan Devi claimed her share in the properties of Roop Shanker as 7/36. Kanchan Devi's suit no.138/1994 was contested by Smt. Premvati by filing a written statement and Smt. Premvati admitted that Kanchan Devi and defendant no.3 Sajjan Devi are real sisters.

It will be worthwhile to mention here that there was one more daughter Basanti of Roop Shanker and his first wife Narmada Pandey but she died long ago leaving behind no heir. It was contended by Premvati in Kanchan Devi's suit that defendant no.2 Shashi Bala contracted second marriage and also gave birth to one daughter after her second marriage and, therefore, Shashi Bala had no share in the properties of Roop Shanker.

Defendant Shashi Bala also submitted written statement and claimed her share in the property. She clearly mentioned in her written statement that she has

already filed suit no.37/1973 (17/1977) for partition of the properties of Roop Shanker and wherein a preliminary decree has already been passed on 10.2.1982, reference of which has been given in preceding paras of this judgment. She also submitted that in the preliminary decree, her share has been declared 1/8. In the written statement, Shashi Bala also stated that no will was executed by Roop Shanker.

Defendant no.3 Sajjan Pandey did not choose to file any written statement.

In view of the pleadings in civil suit no.138/1994, the trial court framed the issues which include the issue about will of deceased Roop Shanker dated 17.12.1975 as well as in relation to second marriage of Shashi Bala.

It appears from the issues that despite the fact that the suit no.138/1994 of Kanchan Devi was in relation to the properties of Roop Shanker, a specific plea was taken about earlier suit no.37/1973 (17/1977) but no issue was framed by the trial court in the suit no.138/1994 with respect to the effect of decree dated 10.2.1982.

It will further be worthwhile to mention here that despite the pendency of the earlier filed litigation by filing suit no.37/73 (17/77) in which preliminary decree was passed on 10.2.1982 and against which this

S.B. Civil First Appeal No.44/1982 is pending before this Court, the trial court proceeded to decide the suit no.138/1994 of Smt. Kanchan Devi. At this place, we may note that Smt. Kanchan Devi and Smt. Sajjan Pandey, daughters of Narmada Devi and Roop Shanker, were not party in the suit no.37/73 (17/77). The trial court decreed Kanchan Devi's suit no.138/1994 and declared the Kanchan Devi entitled to 7/36$^{th}$ share in the properties of Roop Shanker which were described in para no.5 of the plaint of Kanchan Devi.

Aggrieved against the judgment and decree dated 10.7.1999 passed in Kanchan Devi's suit no.138/1994, regular first appeal was preferred before District Court, Bikaner which was transferred to the Court of Additional District Judge No.2, Bikaner and that appeal being CAD No.102/1999 preferred by Kanchan Devi was partly allowed and the first appellate court declared that she has 1/24$^{th}$ share in the properties of deceased Roop Shanker.

Being aggrieved against the said judgment and decree dated 8.2.2001 passed by the first appellate court, the second appeal has been preferred by Premvati widow of Roop Shanker before this Court which has been registered as S.B.Civil Second Appeal No.136/2001.

Because of death of Smt. Premvati, during pendency of Second Appeal No.136/2001, applications were

submitted by claimants of properties of Smt. Premvati for being impleaded as legal representatives of Smt. Premvati.

The claim of applicants Shishirkant Sharma and Rajesh Kumar is founded upon Premvati's will dated 28.12.2002 as well as on the basis of adoption deed alleged to have been executed by Premvati adopting Rajesh Kumar. Applicants Shishirkant Sharma and Rajesh Kumar are sons of sister of deceased Premvati.

Another will of the same date i.e. 28.12.2002 has also been set up by one Anand Kumar and Rajesh Kumar and, therefore, Anand Kumar also claimed that he is entitled to the properties of Premvati.

Originally, in the suit filed by Smt. Kanchan Devi, the dispute was whether Shashibala contracted second marriage or not ? And whether after death of Premvati, she inherited any of the properties of Premvati ? Therefore, there was disputed about second marriage of Shashibala.

Apart from these claims in S.B.Civil Second Appeal No.136/2001, identical claims have been raised in S.B. Civil First Appeal No.44/1982 because of the reason that the property involved in the litigation was of the deceased Roop Shanker and all claimants for the properties - Roop Shanker, Premvati and Hari Shanker all died, against whom Shashibala filed suit for

partition.

In S.B.Civil Second Appeal No.136/2001, this Court directed the trial court to hold enquiry about the disputed question of fact which arose because of claim and counter claim of the parties for succession to the shares in the property due to death of Roop Shanker, Premvati and Hari Shanker and because of allegation of second marriage of Shashibala and because of execution of wills and adoption deed. The trial court after recording evidence, returned the finding on the issues remitted to the trial court under Order 22 Rule 5 CPC.

Against the finding of the trial court dated 3.1.2006, objections have been filed by Smt. Shashibala, Anand Kumar, Kanchan Devi and Shishir Kant. Reply has also been filed against the objections filed by Anand Kumar.

Though in both these appeals, the question of taking on record the legal representatives due to death of Roop Shanker and Premvati is pending and for that purpose, enquiyr was conducted in Second Appeal No.136/2001 and no enquiry has been conducted in First Appeal No.44/1982, therefore, this Court by order dated 18.1.2007 directed all the parties to look into the matter afresh because of the simple reason that for he properties which were ancestral in the hands of Roop

Shanker, two partition suits have been filed – one in the year 1973 wherein decree has been granted in favour of the plaintiff by trial court in the year 1982 and thereafter another heir of Roop Shanker – Kanchan Devi filed second suit in the year 1994 and that suit has also been decreed by the trial court.

Though because of the reasons mentioned above, there are two decrees for the properties of Roop Shanker and in the earlier filed suit no.37/1973 (17/1977), the daughters of Roop Shanker and his first wife Narmada Devi were not party and their share is denied on the strength of the will of Roop Shanker dated 17.2.1975 alleged to have been executed in favour of Premvati and Hari Shanker, who was also son of Roop Shanker and Premvati.

In view of the finding given in the subsequently filed suit of Kanchan Devi, it was felt necessary to examine whether the decrees passed by the two courts below – one by the Court of District Judge in Shashibala's suit no.37/1973 (17/1977) dated 10.2.1982 and the decree passed by the trial court in the suit no.138/1994 of Kanchan Devi which was modified by the appellate decree vide judgment and decree dated 8.2.2001 can co-exist. Because of these two decrees, there are two contradictory and unreconcilable

judgments.

At this juncture, it will be worthwhile to mention here that an issue was raised for holding enquiry, during the pendency of these two appeals, about second marriage of Shashibala but that was specific issue in the civil suit no.138/1994 and in suit no.138/1994, the plaintiff of suit no.37/1973 (17/1977) – Shashibala was also party. Despite this specific issue in the suit, it was not noticed nor it was pointed out when this Court passed the order dated 1.2.2006.

Since Shashibala is also wife of pre-deceased son of Roop Shanker and Kanchan Devi is daughter of Roop Shanker and in civil suit no.138/1994, the trial court as well as first appellate court declared the share of Kanchan Devi in the properties of Roop Shanker, therefore, Kanchan Devi was necessary party in suit no.37/1973 (17/1977) filed by Shashibala. Even otherwise, if Kanchan Devi got some share from the properties of Roop Shanker by natural succession and that is sought to be denied on the strength of Roop Shanker's will dated 17.12.1975, then also in the suit initiated by Shashibala and against which S.B. Civil First Appeal No.44/1982 is pending, Kanchan Devi also becomes necessary party in First Appeal No.44/1982 on the strength of finding of trial court and appellate court in her favour in her suit and first appeal

against which S.B.Civil Second Appeal No.136/2001 is pending. Subsequent events happened after the judgment and decree dated 10.2.1982 and that is death of all the appellants of First Appeal No.44/1982, because of which new successors to the properties of Roop Shanker have come up.

In the facts of this case, substantial question of law involved in the Second Appeal No.136/2001 is that,

> "Whether the decree passed by two courts below can be sustained when in earlier filed suit for the same properties (C.O. No.37/1973 new no.17/1977) decree for partition has already been passed ?"

All the learned counsels are heard.

In the facts of the case, it would have been appropriate for the two courts below in the suit of Kanchan Devi to stay the proceedings in the said suit because of the reason that Kanchan Devi's right was sought to be denied by strength of will dated 17.12.1975, otherwise, she was entitled to share in the properties of Roop Shanker, therefore, now this Court cannot and should not avoid to consolidate two matters because of the reason that all disputes are in relation to the ancestral properties in the hands of Roop

Shanker and the claimants are claiming through Roop Shanker for the properties and raised all the claims on the basis of their legal rights or are founded upon the alleged will dated 17.12.1975 which give properties to some of the heirs of Roop Shanker and denied the natural successors.

Another difficulty before this court is that the finding recorded in suit no.37/1973 (17/1977) filed by Shashibala has been recorded when the other natural heir of Roop Shanker namely, Kanchan Devi and Sajjan Devi were not party and if the evidence recorded at the back of Sajjan Devi and Kanchan Devi is read against them, then that will be without giving opportunity to not only rebut the evidence recorded in suit no.37/1973 (17/1977) but that will be reading evidence against the parties in whose presence even the evidence has not been recorded. In the same way, if the finding in the Kanchan Devi's suit no.138/1994 and appellate decree dated 8.2.2001 are upheld, then that may be contrary to the findings which may be recorded in First Appeal No.44/1982.

The evidence of one case cannot be read in another, therefore, neither the evidence of Shashibala's case can be read in Kanchan Devi's case nor evidence of Kanchan Devi's case can be read in the case of Shashibala because of the reason that in

Shashibala's case, Kanchan Devi and Sajjan Pandey had no opportunity to meet with the evidence of Shashibala.

In these circumstances, it will be appropriate that all the judgment and decree passed by the trial court in suit no.37/1973 (17/1977) dated 10.2.1982 against which S.B. Civil First Appeal No.44/1982 has been preferred as well as the judgment and decree passed by the trial court dated 20.7.1999 which was modified by the first appellate court vide judgment and decree dated 8.2.2001 against which S.B.Civil Second Appeal No.136/2001 has been preferred, deserve to be set aside.

Since the suit no.37/1973 (17/1977) filed by Shashibala was the suit filed earlier for partition of the properties claiming share in the properties of Roop Shanker, therefore, it will be appropriate that all the parties claiming their share in the property of Roop Shanker namely, Kanchan Devi, Sajjan Pandey, Shishir Kant, Rajesh Kumar and Anand Kumar be impleaded as parties in suit no.37/1973 (17/1977) and plaintiff Shashibala is permitted to amend the plaint appropriately so that she may put her case against all the newly added defendants and may plead about non-entitlement of share of any of the defendants. The newly added defendants may file written statement and

thereafter, a fresh trial be held and the trial court is directed to decide the suit afresh after holding denovo trial.

It would be appropriate to mention here that if due care have been taken at proper time in the suit filed by Kanchan Devi and appropriate steps would have been taken at appropriate time, above contradictory decrees could have been avoided.

In view of the above, both the appeals – S.B. Civil First Appeal No.44/1982 and S.B.Civil Second Appeal No.136/2001 are allowed, the judgment & decree dated 10.2.1982 in suit no.37/1973 (17/1977) as well as the judgment & decree dated 8.2.2001 in regular first appeal no.102/1999 and judgment & decree dated 20.7.1999 in suit no.138/1994 are set aside.

Plaintiff Shashibala in suit no.37/1973 (17/1977) is directed to implead Kanchan Devi, Sajjan Pandey, Shishir Kant, Rajesh Kumar and Anand Kumar as party defendants. Suit No.138/1994 shall remain consolidated with suit no.37/1973 (17/1977). The defendants who are added as party shall be entitled to file written statement. If need arises, the parties may seek permission from the trial court to amend pleadings so that suit may be tried afresh. Since all the parties

are before this Court, therefore, all the parties are directed to appear before the Court of District Judge, Bikaner on 9.4.2007. Office is directed to send the record to the trial court forthwith.

Since the matter is old one, therefore, the trial court is directed to decide the suit expeditiously preferably within a period of one year from 9.4.2007 without granting unnecessary adjournments to the parties.

(PRAKASH TATIA), J.

S.Phophaliya